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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ ARB.P.813/2018

Date of Decision : 27th March, 2019

INDCARE&KARMA

..... Petitioner

Through: Mr.Manikya Khanna, Adv.

versus

NORTH DELHI MUNICIPAL CORPORATION & ANR.

..... Respondents

Through: Ms.Supreet Bambra, Mr.Sunil
Goel, Mr.Mayank Goel, Advs.
for NDMC.

Mr.Dhanesh Relan, Mr.Rajeev
Jha and Ms.Gauri Chaturvedi,
Advs. for SDMC.

CORAM:

HON'BLE MR. JUSTICE NAVIN CHAWLA

NAVIN CHAWLA, J. (Oral)

1. This petition has been filed under Section 11 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the 'Act') seeking appointment of an Arbitrator for adjudicating the disputes that have arisen between the parties in relation to the Agreement dated 05.11.2008 executed between the petitioner and the erstwhile Municipal Corporation of Delhi.

2. The said Agreement contained an Arbitration Agreement in form of Clause 35 thereof which is reproduced hereinbelow:

“35. In case of any dispute, arising out of the operation of the above agreement, such disputes shall be referred to an arbitrator to be appointed by the Commissioner, MCD whose decision/award shall be final and binding on the both parties. However, the arbitration clause can be invoked only after both the parties have failed to arrive at any settlement in the re-conciliation proceedings. In case the arbitrator to whom the matter is originally referred is unable to act on account of being transferred, vacating his office or any other reason, Commissioner, MCD, and the second party shall have the right to mutually appoint any other person to act as arbitrator, in lieu.”

3. Learned counsel for the petitioner submits that upon trifurcation of the erstwhile Municipal Corporation of Delhi, the rights and obligations under the Agreement have been vested in the respondent no.1 and respondent no.2.

4. The disputes having arisen between the parties, the petitioner first filed a Writ Petition before this Court, being WP(C) 5071/2018 titled ***Indcare & Karma v. North Delhi Municipal Corporation & Anr.***

5. This Court by its order dated 11.05.2018 allowed the petitioner to withdraw the said Writ Petition and gave liberty to the petitioner to resort to arbitration.

6. The petitioner thereafter invoked the Arbitration Agreement vide its notice dated 06.08.2018. Having failed to receive any response from the respondents, the present petition was filed.

7. Reply has been filed only by respondent no.1. It is contended by counsel for the respondent no.1 that the present petition is not maintainable as the petitioner has not shown if it is a registered Partnership Firm. In absence of such proof and in terms of Section 69(3) of the Indian Partnership Act, 1932, the present petition would not be maintainable.

8. She further submits that the claim of the petitioner would be barred by law of limitation. She submits that in the present case, the South Delhi Municipal Corporation, that is, respondent no.2 had terminated the Agreement vide letters dated 31.07.2013 and 30.08.2013. In terms of Section 478(2) of the Delhi Municipal Corporation Act, 1957 (DMC Act), the period of limitation for filing a suit would be six months from the date when the cause of action arises. In any case, the Agreement having been terminated by the letters dated 31.07.2013 and 30.08.2013 and arbitration having been invoked only on 06.08.2018, the claim would be barred by limitation under the Limitation Act, 1963.

9. I have considered the submissions made by the learned counsel for the respondent no.1.

10. As far as the issue of the petitioner being an unregistered Partnership Firm, the same is no longer *res integra*.

11. In ***Umesh Goel v. Himachal Pradesh Cooperative Group Housing Society Limited***, (2016) 11 SCC 313, the Supreme Court has clarified that the arbitral proceedings will not come under the expression “other proceedings” in Section 69(3) of the Partnership Act, and the ban imposed under the Section 69 of the Partnership Act can have no application to the arbitral proceedings as well as arbitration award.

12. As far as the plea of limitation based on Section 478(2) of DMC Act is concerned, this Court by its judgment in ***Well Protect Manpower Services Pvt. Ltd. v. Commissioner Municipal Corporation of Delhi & Anr.***, ILR (2012) 2 Delhi 183 has clarified as under:

“7.....Section 478(2) of the Delhi Municipal Corporation Act provides for a limitation of six months in respect of any act done or purported to have been done in pursuance of the provisions of the Act or any rules, regulation or bye-law made thereunder. The test to be applied for such determination is: Whether the act was done in statutory capacity or has the act been performed under the colour of statutory duty? Section 478(2) shall apply, if the act is done or purported to have been done in pursuance of the provisions of the Act or any rules, regulation or bye-law made thereunder.”

13. In the present case, the contract between the parties is for Operation and Maintenance of 439 Community Toilet Complexes for a period of seven years. The claim of the petitioner is towards the refund of the security amount under the Agreement as also for alleged

excess payment made by the petitioner under the Agreement. These claims do not fall under the ambit of Section 478(2) of the DMC Act as explained in the above referred judgment.

14. As far as the objection of limitation based on provisions of Limitation Act, 1963, learned counsel for the petitioner submits that the cause of action subsists as South Delhi Municipal Corporation could not have alone terminated the Agreement and therefore, the Agreement terminated only by efflux of time in November, 2015, thereby making the invocation of the arbitration within the period of limitation.

15. In my view, the question of limitation has to be determined by the Arbitral Tribunal taking into account the pleadings and evidence led by the parties before the Arbitral Tribunal. In terms of Section 11(6A) of the Act, this Court at the present stage is to confine its scrutiny only to the existence of the Arbitration Agreement and due invocation thereof. As the existence of the Arbitration Agreement and due invocation thereof has not been denied by the respondents, I see no impediment in appointing an Arbitrator for adjudicating the disputes that have arisen between the parties in relation to the abovementioned Agreement.

16. At this stage, I may also record the objection raised by the counsel for the respondent no.2. Though, respondent no.2 neither responded to the notice invoking arbitration nor has chosen to file the reply to the present petition, counsel for the respondent no.2 submits that all rights and obligations under the Agreement were assigned only

to respondent no.1. In absence of any document being filed on record to substantiate this claim, it would not be proper for this Court to enter into this determination at this stage. Respondent no.2 shall be free to take such plea in its defence before the Arbitrator.

17. With the consent of the parties, the parties are referred to the Delhi International Arbitration Centre (DIAC), where they shall appear on 08.04.2019 at 2.00 p.m. DIAC shall appoint a Sole Arbitrator for adjudicating the disputes between the parties.

18. The arbitration and the fee shall be governed by the rules of the DIAC.

19. With the above directions, the petition is disposed of.

Dasti.

NAVIN CHAWLA, J

MARCH 27, 2019/Arya